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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

NO. 885

MARY MOYLAN, et al,

Petitioners

vs.

UNITED STATES OF AMERICA

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

MARY MOYLAN, et al,

Petitioners,

v.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Mary Moylan, Philip Berrigan, Thomas Lewis, George J. Mische, Thomas Melville, Marjorie Melville, John Hogan, James Darst, and Daniel Berrigan, pray for a writ of certiorari to review a judgment of the United States Court of Appeals for The Fourth Circuit, which affirmed a judgment of the United States District Court For The District of Maryland convicting petitioners of the violation of three federal statutes proscribing the mutilation of Government records, destruction of Govern-

ment property and interference with the administration of the Selective Service System.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is in slip form and appears in the Appendix, infra.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether the trial court erred in (1) refusing to charge the jury that it had the right and/or power to acquit petitioners even though they were technically guilty of committing the crimes with which they were charged; (2) in refusing to permit petitioners' counsel to inform the jury that it had the right and/or the power to acquit them even though they were technically guilty of committing the crimes with which they were charged; (3) in interrupting petitioners' counsel when the latter, in his summation, tried the word "conscience," and in then informing the jury of its alleged duty to follow the court's instruction - thus depriving petitioners of the untrammelled right to trial by jury.

STATEMENT OF THE CASE

Petitioners were convicted in the United States District Court for the District of Maryland of the crimes of mutilation of Government records, destruction of Government property and interference with the administration of the Selective Service System: Title 18 U.S.C. section 1361;

Title 18 U.S.C. section 2071(a); Title 50 app. U.S.C. section 462(a).

The undisputed evidence showed that at 12:50 p.m. on May 17, 1968, the petitioners entered the office of Local Board No. 33 in Catonsville, Maryland, and removed approximately 378 I-A, I-Y and II-A files to an adjacent parking lot where they burned the files with homemade napalm.

The petitioners, whose unquestioned sincerity, high purpose and intense dedication permeate the record, the remarks of the trial judge, and the opinion of the appellate court, freely asserted the commission of the acts as their protest against a brutal and revolting war in Vietnam.

The record reveals the following background for the sole issue raised here.

When counsel for petitioners and respondent were discussing the proposed charges with the trial court, the subject of conscience was raised by the latter. */ As he put it:

> "If counsel argue that the jury has power to decide the case on the basis of conscience or similar grounds, rather than on the facts as the jury may find the facts and on the basis of the law as the Court instructs the jury, the Court will interrupt the argument and tell the jury their duty, and, of course, will also remind them in the charge of their duty, to follow the

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*/ In fact, it had been mentioned to the court by petitioners' counsel the prior evening. (TT.783)

instructions of the Court as to the law, as we do, and should do, in each and every case, if our system is to survive." (TT.746).

During his summation, counsel for petitioners attempted to repeat a portion of that of Andrew Hamilton in the trial of John Peter Zenger in 1735. The excerpt is as follows:

"Now, you are, as I have indicated, the cross-section, theoretically, of the community. Our Federal law says that juries should be representative cross-sections of the community. So, in speaking to you, we are speaking to the community, and we are hoping to reach you, a microcosm, a small segment, 12 people, four alternates, who are the community sitting in judgment.

"And I wanted to indicate to you that, in addressing another jury many hundreds of years ago, in a case which affected American history, the case of the printer Zenger in New York, in 1734, Andrew Hamilton made the following address to the jury. It was not this case. It was a printer accused of seditious libel. And he said this, which I think is very much as it is today:

"Jurors are to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties or estates of their fellow subjects.

"That is what we are asking you to do." (TT.783-4).

The Court then interrupted counsel and stated as follows:

> "Mr. Kunstler, you have just said that you are asking the jury to decide on the basis of conscience or similar grounds on the basis of conscience.
>
> "Incidentally, that case was decided before the adoption of the Constitution of the United States, which granted certain rights and with certain limitations imposed by the interpretation of the Constitution by the Supreme Court.
>
> "Before Mr. Kinstler started, I said this to him:
>
> " ' If counsel argues that the jury has the power to decide the case on the basis of conscience, or similar grounds, rather than the facts as the jury may find the facts, and on the basis of the law as the Court instructs the jury, the Court will interrupt the argument to tell the jury their duty, and, of course, will also remind them in the charge of their duty to follow the instructions of the Court as to the law, as we do, and should do, in each and every case, if our system is to survive. ' " (TT. 783).

The Court refused to include in its charge petitioners' requested charge No. 15 which read as follows:

> "A jury need not explain nor answer to anyone, including the Court, for any verdict rendered by it and may decide

factual issues as they see fit." (TT. 858).

The following colloquy then ensued:

"I have never granted such a charge. Such a charge, so far as I know, has never been granted in this district or in this circuit.

"The statement that the jury need not explain or answer to anyone, including the Court, for the verdict rendered by it, was made by Mr. Kunstler. He stated it in his argument. It was not contradicted by the Court, nor contradicted by the government.

"The second half of the requested instruction, if I read it right, is clearly wrong: that a jury may decide factual issues just as they see fit.

"I think I told the jury that it was their sole province -- I gave that much of it to the jury -- and that I was not attempting to control or influence their decision of the factual issues.

"If I did not do that, I will be happy to correct it. I thought I did that right at the beginning."

"MR. BUCHMAN: Well, I think your charge was not as broad as requested."

"THE COURT: Of course, it was not. I did not tell the jury they could decide the factual

issues as they saw fit, because I do not think that is the law. I think they are the sole judges of the facts, and they must decide the facts on the basis of the evidence. I will stand by that until I am instructed to do otherwise by some superior court in this or some other case." (TT. 858-59).

REASON FOR GRANTING THE WRIT

For the first time since Sparf and Hansen v. United States, 156 U.S. 51 (1895) this Court is confronted with the claim that the right to a jury trial embraces the right to appeal to the conscience of the jury to acquit. The claim arises against the background of a nation convulsed in debate over the morality of the conflict of the Vietnam War and at a time when sentiment is locked in a duel with governmental policy. The rigid enforcement of the criminal law in essentially political trials is raising the sharpest conflict since the days when juries refused to convict under the Fugitive Slave Acts.

Petitioners contend that the conduct of the trial court in not only refusing requested instructions but in his affirmative conduct shrivelled petitioners' right to advise the jury of the finality of their judgment and their right to express the community conscience in their verdict.

The argument is, essentially, a simple one. If the jury is, ideally, a representative cross-section of the community, and the defendant is willing to admit that he is indeed guilty of the acts in question, why, then, may he not be acquitted if the community, represented by the panel, approves of their commission? The only fly in the ointment -- and it is not an inconsiderable one -- is that jurors, almost without exception, have no idea of and, thus far,

cannot be sufficiently enlightened as to the extent of their power in this respect.

But this was not always the case. More than two centuries ago Andrew Hamilton addressed a colonial jury in New York in defense of the printer, John Peter Zenger. Zenger was, under the law as it then existed and the facts of his case, clearly guilty of the crime of seditious libel with which he was charged. Yet his lawyer was permitted to urge the twelve men sitting in judgment upon him

> "to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties, or estates of their fellow subjects." */

Because Andrew Hamilton was permitted by even a most despotic colonial judge to appeal to the conscience of the jury, his client was acquitted and the great principle of freedom of the press became one of our most cherished traditions. Yet today, in a theoretically more enlightened age, American juries cannot be told that under the law, they have the power to decide any criminal case as they see fit, and that no one, not judge nor legislator nor executive, can question their decisions, no matter how contrary to law and fact they might be.**/ It cannot be denied that juries have this power, or that their verdicts of acquittal, ***/ once duly rendered, are not open to challenge,

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*/ A Brief Narrative of the Case and Trial of John Peter Zenger by James Alexander. Ed. by Stanley Nider Katz. The Belknap Press of Harvard University Press, Cambridge, 1963, at 93.

**/ "...(W)here Matter of law is complicated with matter of fact, the jury have a right to determine both." Alexander, op. cit. at 91.

***/ or, for that matter, failures to reach any verdict at all.

change or alteration by any other agency of government. If this be so -- and it is so -- then why can they not be told about the full extent of their power as prescribed by the same rule of law that has fashioned every other aspect of the juridical process?

The appellate court has dealt at length with the historical debate that has developed around the doctrine of jury nullification. Appendix, pp. A.6-12 inclusive. It paid scant attention to some recent commentaries by noted students of constitutional law.

Professor Paul A. Freund of the Harvard University Law School who, according to the New York Times,

> "many consider the nation's leading expert on constitutional law, has recently stated that in conscience cases, a jury should be allowed to acquit people who act in a measured way for reasons of conscience."

He went on to add that:

> "there ought to be some new doctrine which would permit a judge to tell a jury that they were to decide in the light of all the circumstances. After the law has been explained to them, the judge might add that the defendants can be acquitted and that the jury does not have to give reasons."
>
> (New York Times, 9/19/68)

Juries, according to Professor Freund, would have to give:

> "'respectful attention' to the law, but it would be made clear to them that nothing

would bar them from choosing for the defendant despite respect for the law."

Professor Joseph L. Sax, of the University of Michigan Law School, writing in the Yale Review, June, 1968, Vol. LVIII, No. 4, at pp. 481-494, shares Professor Freund's views of jury nullification in an article entitled "Conscience and Anarchy."

To urge this position is not to maintain that men are free to pick and choose with impunity what laws they will or will not obey. This is not and has never been the historical standard. However, when such choices are made, it is not too much to demand that juries must be let in on the closely guarded secret that they are, in the final analysis, the consciences of their communities and, as such, are free to acquit those, like John Peter Zenger, who, under ordinary circumstances, are indeed guilty of breaking the law in question. This is a far cry from insisting that all men who follow the dictates of their consciences must go free on that account alone.

Unless the jury can exercise its community conscience role, our judicial system will have become so inflexible that the effect may well be a progressive radicalization of protest into channels that will threaten the very continuance of the system itself. To put it another way, the jury is, both by original design and the nature of its own inherent structure, the safety valve that must exist if this society is to be able to accommodate itself to its own internal stresses and strains. If the jury can negate both law and fact, then it can express the deep desires of the community it represents as to whether it feels that, under certain circumstances, some laws should indeed be broken with impunity. In this manner, this ancient institution can significantly affect or even alter the bedrock decisions that can, in so many instances, determine whether men shall

survive or perish, eat or go hungry, or live in liberty or as slaves.

There can be no question that it is now a fundamental tenet of our federal jurisprudence that juries must be a representative cross-section of the community. In fact, Congress has just enacted legislation to make certain that, in the courts of the United States, juries meet this standard of representation. */ Implicit in this national determination is the inescapable conclusion that criminal defendants should have the benefit of the local consensus as to every aspect of their guilt or innocence under the laws asserted against them. If the community is to sit in the jury box, its decisions cannot be legally limited to a conscienceless application of fact to law.

The rule of law cannot mean that there shall be an unbroken, inflexible pattern of squaring fact with law to reach, in every instance, a mechanistic, almost computer-like conclusion. If jurors were so compelled, then John Peter Zenger would have rotted in a colonial jail along with the right of newspapers to print the truth without fear that their publishers, editors, or reporters would pay for their veracity with years of their lives. But as Andrew Hamilton told the printer's jury, the answer was for it to fulfill its solemn duty

> "to support liberty, the only bulwark against lawless power which in all ages has sacrificed to its wild lust and boundless ambition the blood of the best men that ever lived."

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*/ See Jury Selection and Service Act of 1968; Public Laws 90-274; 82 Stat. 53

It is true that many judges, particularly those on the federal bench, have been inordinately impressed by Mr. Justice Fortas' recent pamphlet on civil disobedience.*/ Some have even progressed to the point where they are fashioning some of their charges to the jury from it.**/ In essence, Justice Fortas maintains that any violation of the law, no matter how well-intentioned or sincerely motivated, must be punished. As he puts it,

> "Protesters and change-seekers must adopt methods within the limits of the law.***/"

But he fails to take into consideration the fact that juries can nullify those laws that affront their conscience. This is precisely why, a century past, Northern juries steadfastly refused to convict those men and women who, in open defiance of federal law, refused to surrender fugitive slaves to their pursuers. See also Sisson v. United States, 294 F. Supp. at 523.

In this case, of course, the trial court did more than restrict the jury by its refusal to instruct as requested. He interrupted trial counsel in a fashion that precluded the latter from making the customary appeal to the jury that all criminal lawyers make in the most conventional case. In his zeal to insure conviction by adherence to his instructions on the law, the judge prevented the jury not only from being informed of its right of jury nullification but from exercising the conscience of the community in response to the appeal of trial counsel.

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*/ Fortas, Concerning Dissent and Civil Disobedience, New York, The New American Library, Inc. 1968.

**/ Including the court below.

***/ Fortas, Op. Cit.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 12,988 - United States of America, Appellee, versus Mary Moylan, Appellant.

No. 12,989 - United States of America, Appellee, versus Philip Berrigan, Appellant.

No. 12,990 - United States of America, Appellee, versus Thomas Lewis, Appellant.

No. 12,991 - United States of America, Appellee, versus George J. Mische, Appellant.

No. 12,992 - United States of America, Appellee, versus Thomas Melville, Appellant.

No. 12,993 - United States of America, Appellee, versus Majorie Melville.

No. 12,994 - United States of America, Appellee, versus John Hogan, Appellant.

No. 12.995 - United States of America, Appellee, versus James Darst, Appellant.

No. 12,996 - United States of America, Appellee, versus Daniel Berrigan, Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

(Argued June 10, 1969. Decided October 15, 1969

Before Haynsworth, Chief Judge, and Sobeloff and Winter, Circuit Judges.

William N. Kunstler (Harold Buchman, Fred Weisgal, Robert R. Drinan, William C. Cunningham, Harrop A. Freeman on brief) for Appellants, and Barnet D. Skolnik, Assistant United States Attorney, (Stephen H. Sachs, United States Attorney, on brief) for Appellee.

SOBELOFF, Circuit Judge:

The defendants appeal their conviction in the United States District Court for the District of Maryland for violation of three federal statutes proscribing the mutilation of Government records, destruction of Government property and interference with the administration of the Selective Service System. [1] The facts are uncontroverted. At 12:50

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1. Title 18 U.S.C. § 1361 provides in pertinent part: Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows: ***

Title 18 U.S.C. § 2071 (a) provides: Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(footnote 1 continued on page A.3)

P.M. on May 17, 1968, the appellants entered the office of Local Board No. 33 in Catonsville, Maryland and removed approximately 378 I-A, I-Y and II-A files to an adjacent parking lot where they burned the files with homemade napalm. The appellants, men and women with sincere and strong commitments, readily admit the commission of these acts as a protest against the war in Vietnam.

The appeal is based on asserted error in the trial court's instructions to the jury. The appellants claim that: (1) The trial court erred in charging the jury on the definition of criminal intent and the meaning of "willfully," and, (2) That the trial judge should have informed the jury that it had the power to acquit the defendants even if they were clearly guilty of the offenses, or at least, that the court should have permitted their counsel so to argue to the jury.

I.

For the appellants to be convicted of the crimes for which they were indicted, they must have acted knowingly

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(footnote 1 continued from page A.3)

Title 50 App. U.S.C. § 462 (a) provides in pertinent part: *** or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, ***.

(50 App. U.S.C. § 462 (a)) or willfully (18 U.S.C. §§ 1361, 2071 (a)). The trial court instructed the jury to the effect that the willful intent requisite to constitute a violation of the statutes involved is the intent on the part of the accused to commit the proscribed acts with knowledge that they were violating the statute. Defense counsel urged upon the court a more expansive interpretation of the word "willful" as used in the statutes, namely that no violation occurred unless defendants performed the admitted acts with a bad purpose or motive. Their position was and is that since they acted from good motives, i.e., to protest a war which they sincerely believed was not only illegal[2] but immoral, they could not have "willfully" violated the statutes and must be acquitted. We agree with the interpretation of the trial judge.

To read the term "willfully" to require a bad purpose would be to confuse the concept of intent with that of motive. The statutory requirement of willfulness is satisfied if the accused acted intentionally, with knowledge that he was breaching the statute. While the trial judge allowed evidence to be freely admitted concerning the defendants' motives, whatever motive may have led them to do the act is not relevant to the question of the violation of the statute, but is rather an element proper for the judge's consideration in sentencing.

The cases appellants cite to support their argument with respect to "willfulness" are not controlling in the present situation. In Morrissette v. United States, 342 U.S.

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2. Defendants have repeatedly linked a characterization of the war as illegal with their assertions that it is immoral. Since despite this assertion of illegality they have not briefed or argued the question--nor has the Government done so--we will not pass on the issue. See, Holmes v. United States, 391 U.S. 936 (1968)

246, the defendant removed a number of spent bomb casings from an Air Force bombing range under the mistaken belief that the casings had been abandoned. The Supreme Court reversed his conviction, holding that his mistaken belief negated the requisite mens rea. He was acting in good faith since he believed that the casings had been abandoned. However, this is not to say that Morrissette would have been entitled to acquittal if he had taken the bomb casings with the knowledge that they were not abandoned, but did so for the purpose of protesting the use of bombs as weapons of destruction. Similarly, the appellants in the instant case could not destroy Government property with knowledge that the destruction was illegal and claim that, due to their motivation, the action lacked the requisite willful intent.

Other cases[3] cited by appellants likewise stand for the incontestable proposition that a mistaken belief as to a material fact may negate the requisite mens rea. Here the appellants, by their own admissions accompanying the acts, knowingly and purposely committed the offense denounced by the statute. They do not challenge the validity of the laws under which they were prosecuted. Furthermore, the language of cases cited by appellants supports the interpretation the district court and we place on "willfulness."[4]

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3. Keegan v. United States, 325 U.S. 478 (1945); United States v. Murdock, 290 U.S. 389 (1933); Okamoto v. United States, 152 F.2d 905 (10th Cir. 1945).

4. Screws v. United States, 323 U.S. 91, 101 ("an evil motive to accomplish that which the statute condemns is a constituent element of the crime.") (Emphasis added) United States v. Rabb, 394 F.2d 230, 232 ("The word 'willfully' as used in the crime charged means the act (or omission) was committed (or omitted) by the defendant voluntarily, with the purpose of violating the law, and not by mistake, accident or in good faith.")

II.

Appellants' second contention is that the trial judge should have informed the jury, as requested, that it had the power to acquit even if appellants were clearly guilty of the charged offenses. They maintain that the judge should have told the jury this or permitted their counsel to argue it to the jury in the face of the judge's instructions on the law. Appellants reason that since the jury has "the power to bring in a verdict in the teeth of both law and facts",[5] then the jury should be told that it has this power. Furthermore, the argument runs, the jury's power to acquit where the law may dictate otherwise is a fundamental necessity of a democratic system. Only in this way, it is said, can a man's actions be judged fairly by society speaking through the jury, or a lw which is considered too harsh be mitigated.

Historically, a fierce controversy has raged over the question of whether the trial judge was under a duty to instruct the jury that it may disregard the law as he has explained it.[6] The earliest reported case adhering to the distinction between law and fact in regard to the respective roles of judge and jury in criminal cases seems to be

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5. Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

6. The classic debate is found in the several opinions of the Justices in Sparf and Hansen v. United States, 156 U.S. 51 (1895). See also, e.g., Skidmore v. Baltimore & Ohio RR Co., 167 F.2d 54 (2d Cir. 1948); Morris v. United States, 156 F.2d 525 (9th Cir. 1946); Farley, Instructions to Juries -- Their Role in the Judicial Process, 42 Yale L.J. 194 (1932); Howe, Juries as Judges of Animal Law, 52 Harv. L. Rev. 582 (1931); Thayer, The Jury and Its Development, 5 Harv. L. Rev. 249 (1892).

Plowden's report of Townsend's case where the reporter comments,

> "For the office of 12 men is no other than to inquire of Matters of Facts and not to adjudge what the Law is, for that is the office of the Court and not of the Jury ***." [7]

While Littleton had earlier recognized the power of the jury to "determine the crime or issue by their verdict" [8] upon the basis of both law and fact, it is Lord Coke's famous pronouncement which firmly established the law/fact dichotomy in English Jurisprudence:

> "The most usual trial of matters of fact is by 12 such men; for ad quaestionem facti non respondent judices; and matters in law the judges ought to decide and discuss; for ad quaestionem juris non respondent juratores." [9]

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7. 1 Plowden 110a, 114a (K.B. 1554) cited in Farley, supra n.5 at 198. Also see, e.g., Hobard 53 (K.B. 1615); Dyer 362a 15 (K.B. 1557); Hard. 16 (Ex. 1655); 2 Bulst. 314 (K.B. 1614). For cases cited to support juries as the judge of both law and fact see, e.g., Rex v. Dean of St. Asaph's, Conscience and Anarchy: The Prosecution of War Resistors, The Yale Rev., Vol. LVII (1968) at 484.

8. Littleton, Co. Litt. 368.

9. 1 Coke on Littleton (1st Am fr. 19th London ed. 1853) 155b cited in Sunderland, Verdicts, General and Special, 29 Yale L.J. 253 (1920).

In the early history of the American Colonies and for a time after the Revolution juries were nearly always recognized as having the power to judge both law and fact.[10] This is exemplified in the early Supreme Court case of Georgia v. Brailsford, 3 Dall. 1, 4, in which Chief Justice Jay declared:

> "*** for as, on the one hand, it is presumed that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still, both objects are lawfully within your power of decision."

In criminal cases juries remained the judges of both law and fact for approximately fifty years after the Revolution. However, the judges in America, just as in England after the Revolution of 1688, gradually asserted themselves increasingly through their instructions on the law.

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

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10. Appendix II of Quincy Reports (Mass. 1761) 559.

Concededly, this power of the jury is not always contrary to the interests of justice. For example, freedom of the press was immeasurably strengthened by the jury's acquittal of John Peter Zenger of seditious libel, a violation of which, under the law as it then existed and the facts, he was clearly guilty. In that case Alexander Hamilton was allowed to urge the jury, in the face of the judge's charge,

> "to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties, or estates of their fellow subjects."[11]

No less an authority than Dean Pound has expressed the opinion that

> "Jury lawlessness is the great corrective of law in its actual administration."[12]

However, this is not to say that the jury should be encouraged in their "lawlessness," and by clearly stating to the jury that they may disregard the law, telling them that they may decide according to their prejudices or consciences (for there is no check to insure that the judgment is based upon conscience rather than prejudice), we would indeed be negating the rule of law in favor of the rule of lawlessness. This should not be allowed.

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11. Alexander, James, A Brief Narrative of the Case and Trial of John Peter Zenger, (Harv. U. Press 1963) ed. by Stanley Nider Katz at 93.

12. Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18 (1910). Also see, e.g., Sparf and Hansen v. United States, supra, n.5 at 110 (Gray and Shiras, J.J. dissenting); United States v. Sisson, supra n. 11; Howe, supra n. 5.

The Supreme Court, in the landmark case of Sparf and Hansen v. United States, 156 U.S. 51 (1895), affirmed the right and duty of the judge to instruct on the law, and since that case the issue has been settled for three-quarters of a century. Justice Harlan's scholarly opinion traced the history of the rights of juries in criminal cases. He distinguished Brailsford as a civil case and therefore not controlling in criminal trials. Justice Harlan further deprecated that decision, going to the extreme of questioning whether it was in fact reported properly, since he doubted that Chief Justice Jay could ever have held such an opinion even in a civil case. The Justice concluded finally that

> "Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as in their judgment were applicable to the particular case being tried."
>
> * * *
>
> "But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court. *** We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that

law to the facts as they find them to be from the evidence." [13]

There was a powerful dissent by Justice Grey joined by Justice Shiras. As in the majority decision, Justice Grey historically traced the authorities and the classic arguments to support his conclusion that the jury should decide both the law and the facts. [14]

The Harlan majority opinion, however, has carried the day. Since the Sparf case, the lower federal courts -- even in the occasional cases in which they may have ventured to question its wisdom[15] -- have adhered to the doctrine it affirmed. [16] Furthermore, among the states, only two still allow the jury to be told that they can disregard the law as given them by the court. [17]

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13. Sparf and Hansen v. United States, supra, n. 5 at 101-102.

14. Id. at 110.

15. United States v. Adams, 126 F.2d 774, 775-76 (2nd Cir. 1942); United States v. Sisson, 294 F. Supp. 520, 524-25 (D. Mass. 1968).

16. See, e.g., Berra v. United States, 351 U.S. 131, 134 (1956); Horning v. District of Columbia, supra n. 4 at 138; Hepner v. United States, 213 U.S. 103 (1909); Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1898); Driscoll v. United States, 356 F.2d 324 (1st Cir. 1966); Skidmore v. Baltimore & O.R.Co., supra n. 5; Morris v. United States, supra n. 5 at 525; Ex parte United States, 101 F.2d 870 (7th Cir. 1939).

17. Maryland and Indiana. See, e.g., Wiley v. Warden, Maryland Penitentiary, 372 F.2d 742 (4th Cir. 1967), where it was stated that "Indiana has substantially attenuated its provisions by judicial modification, holding as early as 1889 that a trial court in a criminal case 'is not required to neutralize the effect of its instructions by telling the jury that

(footnote 17 continued on page A. 12)

The recent case of United States v. Spock, et al., ____ F.2d ____ (1st Cir. 1969), heavily stressed by the appellants in their supplemental memorandum, does not reach a different conclusion. That case was concerned with the question arising from submission of special interrogatories to the jury. The First Circuit, speaking through Chief Judge Aldrich, concluded that

> "By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions." [18]

Nowhere does the court intimate that the judge should not instruct the jury on the law, and nowhere does it hold, as appellants here contend, that the jury should be instructed that it may disregard the law as declared by the judge.

III.

As an undercurrent throughout the trial and interwoven with appellants' assertions of error is an appeal to morality as justification for their conduct. The argument consists of two closely related strands. They argue

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(footnote 17 continued from page A.11)
they are at liberty to disregard them, and to decide the law themselves.'" citing from Bridgewater v. State, 153 Ind. 560, 566, 55 N.E. 737, 739 (1889).

18. United States v. Spock, et al., ____ F.2d ____, (July 11, 1969) No. 7205-7208, Slip op. at 28-29.

that the motivation for their action was moral in the sense that they intended to protest a war which is outrageous to their individual standards of humanity. Therefore, their actions are said to be not punishable regardless of the literal violation of a statute. Moreover, appellants argue that apart from their motivation, which is subjective, the war in Vietnam is in fact illegal and immoral and hence their acts in protest of this war were themselves moral acts for which they must be similarly immunized from punishment.[19] In effect, the appellants focus upon the means by which an organized society treats those citizens who choose to commit an act of civil disobedience in the name of justice.

From the earliest times when man chose to guide his relations with fellow men by allegiance to the rule of law rather than force, he has been faced with the problem how best to deal with the individual in society who through moral conviction concluded that a law with which he was confronted was unjust and therefore must not be

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19. The motivation prompting the defendants' acts was eloquently expressed by defendant James Darst: "The basic human duty is to cry out in the face of a crime, in the face of suffering that can be prevented, perhaps, by a cry *** (and) doing a very tiny bit to stop the machine of death that I saw moving and killing *** to hinder this effort in a literal way, an actual, physical, literal way, by preventing these people, these young men, from being taken by the war effort and then put to killing people unnecessarily."

Trial testimony of James Darst, 401-402.

followed.[20] Faced with the stark reality of injustice, men of sensitive conscience and great intellect have sometimes found only one morally justified path, and that path led them inevitably into conflict with established authority and its laws. Among philosophers and religionists throughout the ages there has been an incessant stream of discussion as to when, if at all, civil disobedience, whether by passive refusal to obey a law or by its active breach, is morally justified. However, they have been in general agreement that while in restricted circumstances a morally motivated act contrary to law may be ethically justified, the action must be non-violent and the actor must accept the penalty for his action. In other words, it is commonly conceded that the exercise of a moral judgment based upon individual standards does not carry with it legal justification

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20. Among the more recent discussions of the dilemma that civil disobedience presents in our society see, e.g., Allen, Civil Disobedience and the Legal Order, 36 U. Cin. L. Rev. 1, 175 (1967); Black, The Problem of the Compatibility of Civil Disobedience with American Institutions of Government, 43 Texas L. Rev. 492 (1965); Cohen, Freeman & Van den Haag, Symposium--Civil Disobedience and the Law, 21 Rutgers L. Rev. 1 (1966); Griswold, Dissent--1968, 42 Tulane L. Rev. 726 (1968); Keeton, The Morality of Civil Disobedience, 43 Texas L. Rev. 507 (1965); Rosen, Civil Disobedience and Other Such Techniques: Law Making Through Law Breaking, 37 Geo. Wash. L. Rev. 435 (1969); Smith, Legitimacy of Civil Disobedience as a Legal Concept, 36 Fordham L. Rev. 707 (1968). See also, Fortas, Concerning Dissent and Civil Disobedience (1968), King, Why We Can't Wait (1964); Whittaker and Coffin, Law, Order and Civil Disobedience (1967).

or immunity from punishment for breach of the law.[21]

The defendants' motivation in the instant case--the fact that they engaged in a protest in the sincere belief that they were breaking the law in a good cause--cannot be acceptable legal defense or justification. Their sincerity is beyond question. It implies no disparagement of their idealism to say that society will not tolerate the means they chose to register their opposition to the war. If these defendants were to be absolved from guilt because of their moral certainty that the war in Vietnam is wrong, would not others who might commit breaches of the law to demonstrate their sincere belief that the country is not prosecuting the war vigorously enough be entitled to acquittal? Both must answer for their acts.

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21. Adherents and practitioners of civil disobedience who have reached this conclusion are too many to list. One need only allude to Socrates, Sir Thomas Moore, Henry David Thoreau, Gandhi, and Martin Luther King, Jr. whose actions supported this proposition. The Lutheran and Episcopal Churches in America have endorsed civil disobedience, but only if action is non-violent and the actor is willing to accept the consequences of his action. See, Lutheran Church in America, Statement on Race Relations, July 9, 1964 (adopted by the 1964 convention of the church in Pittsburgh, Penna.); Episcopal Church, Report No. 5 on Christian Social Relations (adopted by the 1964 General Convention of the Church in St. Louis, Missouri).

We are not called upon in this case to establish guidelines for determining in what extreme circumstances, if any, governmental acts may be resisted. We confine ourselves to this case and hold only that the law does not allow the seizure of public records and their mutilation or destruction, even when this is done as an act of conscience to dramatize the protest of a presumed evil. The acts of these appellants are not as extreme as some committed by other dissenters. Nevertheless, this publicly exploited action cannot be dismissed as de minimis. To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitable anarchic.

The judgment below is

Affirmed.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

FOURTH CIRCUIT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

PHILIP R. MONAHAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 885

MARY MOYLAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1969. The petition for a writ of certiorari was filed on November 25, 1969, more than 30 days later, and is thus out of time under Rule 22(2)

of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were entitled to have the jury instructed that it had the power and the right to acquit no matter how clearly guilty they were under the facts as found by it and the law as expounded to it by the court.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioners—Mary Moylan, Philip Berrigan, Thomas Lewis, George J. Mische, Thomas Melville, Marjorie Melville, John Hogan, James Darst, and Daniel Berrigan—were each convicted on counts 2, 3, and 4 of a four-count indictment charging that they willfully injured property of the United States, causing damage in excess of $100, in violation of 18 U.S.C. 1361 (count 2), willfully destroyed records filed in a public office of the United States, in violation of 18 U.S.C. 2071 (count 3), and willfully and knowingly interfered with the administration of the Military Selective Service Act, in violation of 50 U.S.C. App. 462(a) (count 4) (1 R. 11-17).[1] On November 8, 1968, petitioners Moylan, Marjorie Melville, Hogan, and Darst were sentenced to concurrent two-year prison terms

[1] Count 1, charging that petitioners conspired to commit the substantive offenses, was dismissed pursuant to the entry of a *nolle prosequi* by the government (1 R. 65-73).

on each count; petitioners Mische, Thomas Melville, and Daniel Berrigan, to concurrent three-year terms on each count; and petitioners Philip Berrigan and Lewis to three years and six months on each of counts 2 and 4 and three years on count 3, all three terms to run concurrently with one another and with the six-year sentences imposed on them in Criminal Case No. 27817 (a similar prosecution, involved in No. 884, this Term, pending on petition for a writ of certiorari filed contemporaneously with the instant petition) (1 R. 65-73). The court of appeals affirmed.

The undisputed evidence showed that at 12:50 p.m. on May 17, 1968, petitioners entered the office of Local Board No. 33 in Catonsville, Maryland, removed 378 Selective Service files to an adjacent parking lot, and burned them with homemade napalm (Pet. App. A2-A3). Petitioners, testifying in their own behalf, admitted their participation in the incident (4 R. 391-392; 5 R. 462, 503-505, 517, 543, 589, 603, 622, 680-681). Their asserted justification was that they wished to protest against the Vietnam conflict. Each acknowledged that he was fully aware at the time of the episode that his acts would hinder the administration of the Selective Service Act (4 R. 413-416; 5 R. 480, 511, 540, 563, 599, 619, 636, 704).

ARGUMENT

Petitioners' principal contention—that they were entitled to have the jury instructed that it had the power and the right to acquit no matter how clearly guilty they were of the offenses charged under the

facts as found by it and the law as expounded by the court—is without merit. *Berra* v. *United States*, 351 U.S. 131, 134; *Horning* v. *District of Columbia*, 254 U.S. 135, 138-139; *Hepner* v. *United States*, 213 U.S. 103, 114; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 101-103; *Driscoll* v. *United States*, 356 F. 2d 324, 327 (C.A. 1), vacated on other grounds, 390 U.S. 202; *Morris* v. *United States*, 156 F. 2d 525, 529 (C.A. 9). That the jury has the power to bring in a verdict in the teeth of both law and facts (*Horning* v. *District of Columbia*, *supra*, 254 U.S. at 138) does not mean, as the court of appeals noted, that the court is to encourage it in such lawlessness (Pet. App. A9). The issue is fully discussed in the opinion below (Pet. App. A6-A12) and there is no need to add to what is there said.

Petitioners also appear to argue that they were prejudiced when the court interrupted counsel's argument to the jury that it should exercise such power. Even if the interruption had been uncalled for, however, it did not constitute reversible error. The court had put defense counsel on notice before the final argument that it would interrupt any argument that the jury should decide the case on grounds of conscience, to remind the jury of their duty (Pet. 3), and the judge's statement of that duty in making the interruption was correct. As petitioners do not relate, counsel returned to the subject after the interruption and stated:

> The jury does not have to give any reasons for its verdict. It is responsible to no one for the reasons it decides. It must follow the law, and

> the judge will indicate that. But it need not answer to anyone for what it does. No reasons are required, no explanations. You may decide as you see fit from what you know about this case and from the law as the judge gives it. [6 R. 787].

Thus, defendants were allowed to notify the jury of its power and precluded only from expressly encouraging the jury to exercise it. Under these circumstances, and in view of the settled law which the court correctly stated in its admonition, the interruption cannot be termed prejudicial.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

DECEMBER 1969.

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SUPREME COURT, U. S.
OCT 15 1970
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No. 885

In the Supreme Court of the United States

OCTOBER TERM, 1969

MARY MOYLAN, ET AL., PETITIONERS

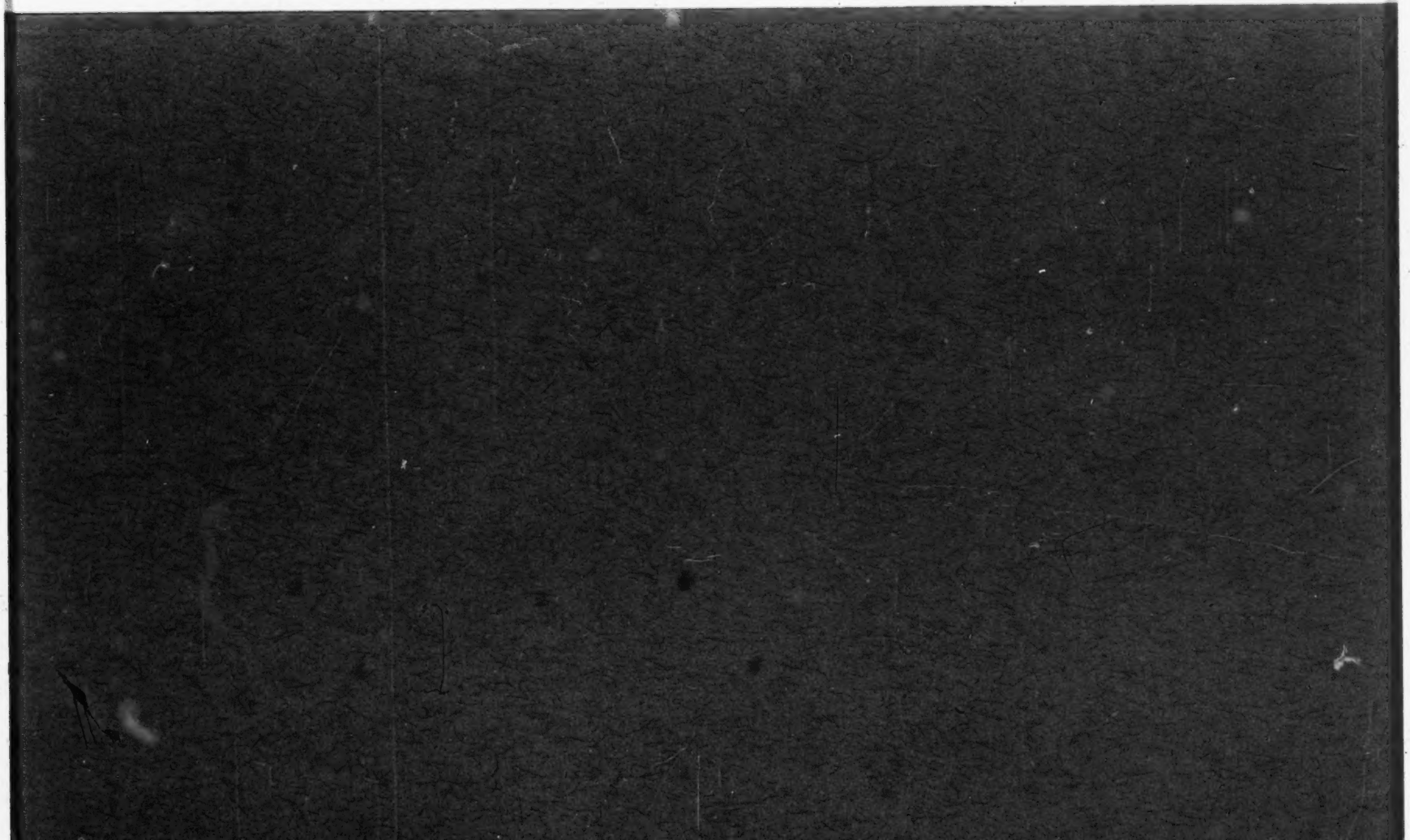
v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 885

MARY MOYLAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted to bring to the Court's attention information relating to electronic surveillance involving the petitioner Daniel Berrigan which has been uncovered since the brief in opposition in this case was filed.

Although petitioner Berrigan was not at any time the subject of electronic surveillance directed against him, he did participate in one conversation that was overheard during the course of a surveillance, authorized by the Attorney General and involving no trespass, of premises in which the petitioner had no proprietary interest. The overheard conversation occurred in May 1966, two years before the offense of which he was convicted, and had no relation whatever to the offense.

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Petitioner Berrigan and eight other persons, his co-petitioners herein, were convicted of destroying by burning, in May 1968, more than 300 Selective Service files which they had removed for the purpose from a Catonsville, Maryland, draft board office. The evidence was undisputed. It showed, in fact, that representatives of the press had been alerted in advance that a "spectacular" and "newsworthy" event was about to take place (4 R. 237–240; 6 R. 765). As a consequence, newsmen and photographers were present at the scene to witness and record the events and a motion picture film, which was exhibited to the jury, was taken of the proceedings (4 R. 238–283). All of the defendants, testifying in their own behalf, admitted their participation in the affair (4 R. 391–392; 5 R. 462, 503–505, 517, 543, 589, 603, 622, 680–681) and it was represented to the jury by their counsel that they were proud of their accomplishment (4 R. 224).

The normal procedure which this Court has followed, when it has been advised by the Solicitor General that the government has conducted arguably illegal electronic surveillance of a convicted litigant who has standing to object to it, has been to remand the proceeding to the district court for a hearing to determine whether the interception was in fact illegal and, if so, whether the conviction was tainted thereby. *E.g., Alderman* v. *United States,* 394 U.S. 165; *Giordano* v. *United States,* 394 U.S. 310; *Mrkonjic-Ruzic* v. *United States,* 394 U.S. 454. Resolution of the latter issue, if it is reached, has involved the determination

of whether the government used the overheard conversation or conversations in "building its case against" the accused. *Alderman* v. *United States, supra,* 394 U.S. at 183. Where, however, as in this case, the offense is one which was publicly committed, in the presence of newsmen and photographers who were invited to witness and record it, and the defendants have acknowledged at trial that the objective acts charged were committed, it is suggested that the absence of any connection between the overheard conversation and the "building" of the government's case is apparent on the face of the record. If so, the normal procedure of remand, for determination of the question of legality, would seem unnecessary. If the Court agrees, it is submitted that certiorari should be denied as to petitioner Berrigan in accordance with our original submission. Otherwise, remand in accordance with the Court's usual practice in cases of this sort would appear to be indicated as to that petitioner.[1]

The petition should at all events be denied as to the other petitioners. Cf. *Giordano* v. *United States, supra,* 394 U.S. at 312.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

[1] The log of the overheard conversation, consisting of 14 typewritten lines, is of course available should this Court wish to inspect it.

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